IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PTD ENTERPRISE, LLC, ET AL. Plaintiffs vs. LHS GULF SHORES, INC, ET AL., Defendants	Civil Action No.: 3:14-CV-1860 **3:14–CV–01860–MEM** Hon. Malachy E Mannion

BRIEF IN OPPOSITION OF DEFENDANTS' MOTION TO SET ASIDE THE ENTRY OF DEFAULT

Plaintiffs PTD Enterprise, LLC ("PTD") and Phil Van Wettering ("Mr. Van Wettering") (PTD and Mr. Van Wettering may hereinafter be referred together as Plaintiffs), hereby submit this Brief in Opposition of Defendants' Motion to Set Aside the Entry of Default.

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I. BACKGROUND

a. COUNTERSTATEMENT OF PROCEDURAL HISTORY

This suit was commenced on September 24, 2014 by Plaintiffs PTD Enterprise, LLC ("Enterprise") and Phil Van Wettering ("Mr. Van Wettering") and against sophisticated Defendants, above-captioned, by way of Complaint. Plaintiffs subsequently filed an Amended Complaint on October 13, 2014 and the same, along with the notice of lawsuit, Request for Waiver of Service of Summons, and a Waiver of Service of Summons was served on all Defendants on or about October 21, 2014.

On or about November 13, 2014, counsel for Plaintiffs were contacted by Attorney Kerry Anne Schultz who represented that she is counsel for Defendants in Florida, and would be putting counsel for Plaintiffs in contact with a purported attorney, Frank Fusco, near the Scranton area. On or about November 24, 2014, counsel for Plaintiffs were contacted by a Frank Fusco representing that he was counsel for Defendants and wanted to discuss the damages in this matter in hopes of resolving the same. A phone conversation was held on December 2, 2014 to discuss the damages with Frank Fusco who again represented to counsel for Plaintiffs to be the attorney for all Defendants. December 2, 2014 was the last time counsel for Plaintiffs heard from Frank Fusco, despite repeated attempts to contact him.

Not having received any correspondence or waivers from any Defendants or Frank Fusco, Plaintiffs again served the Amended Complaint along with the Summons upon all Defendants on January 14th and 20th, 2015, respectively. ECF #6.

On February 17, 2015, having received no response from Defendants' purported counsel Frank Fusco, and no attorney having formally entered his/her appearance on behalf of any Defendants despite nearly a five month time period from the initial filing and service of the Complaint in this matter, counsel for Plaintiffs requested an entry of default, which was entered on February 18, 2015. ECF #11, 12.

Finally, on March 17, 2015, a month after filing and serving the request for entry of default and nearly an entire six months since the initiation and service of the original complaint in this matter, Plaintiffs' filed a Motion for Default Judgment. *See* ECF #13. Then, on March 18, 2015, Attorney Michael J. Donohue entered his appearance on behalf of all Defendants in this matter. ECF #14. Attorney Donohue subsequently filed a Motion to set aside the default six months after the initial filing and service of the complaint in this matter, and only after Plaintiffs were forced to expend additional sums of money to serve all Defendants, and only after Plaintiffs were forced to expend additional sums of money and effort in discussing damages with Frank Fusco who held himself out as the attorney for Defendants, only for Plaintiffs to discover that at the time of these communications, Mr. Fusco appeared to have been suspended from the practice of law. A copy of both the Pennsylvania Disciplinary Board website and New Jersey website showing Mr. Fusco to be on "Administrative Suspension" and "Admin Ineligible" are attached hereto as Exhibit "A" along with correspondence from Attorney Schultz putting Plaintiffs in contact with Mr. Fusco.

b. COUNTERSTATEMENT OF FACTS

This case represents the struggles, loss and hardship of Plaintiffs against a group of sophisticated defendants, who continuously demonstrate a total disregard for the property, rights and livelihood of Plaintiffs. Because of Defendants' culpable conduct, Plaintiffs have lost their family property, business contacts and reputation, and livelihood in which to provide for Plaintiff's family. Point in fact, Defendants' procedural delay in this matter – failing to enter an appearance until six months after the initial filing and service of the Complaint, and putting counsel for Plaintiffs in contact with an individual purporting to represent Defendants who was on "administrative suspension" and never hearing back from him is consistent with Defendants' character and dealings with Plaintiffs from the very beginning of the Parties relationship; that is, delaying and leading Plaintiffs on by continuous assurances that Defendants will finally resolve the matter.

From the start, Plaintiffs were induced by Defendants to provide them with certain hospitality goods, such as televisions. Plaintiffs did provide Defendants with said goods, the goods were used by every Defendant in their hotels, but Plaintiff never received payment from Defendants. Rather, Defendants would continuously assure Plaintiffs (via telephonic communications, text messages and emails, of which are attached to Plaintiffs' Amended Complaint), that Plaintiffs would be paid what Defendants themselves admit as "outstanding debt" for the televisions. Even more, Defendants continuously communicated to Plaintiffs that they "do not dispute" that they "must pay" Plaintiffs for the televisions, rather, they just need "more time." *See* Exhibits J and K to Amended Complaint. Plaintiffs, however, were never paid and Defendants continue, to this day, to be unjustly enriched, receiving the benefits of the televisions in every one of their hotels at Plaintiffs costly expense.

Extraordinarily, on or about March 26, 2015, six months after the initial complaint was filed and served and nearly four (4) years from Defendants initial use and benefit from the televisions in their hotels, for the first time did Defendants mention remote control "issues". To be sure, prior to March 26, 2015, Plaintiffs and Defendants exchanged hundreds of phone calls, text messages, and emails wherein Defendants continuously stated that they do not dispute the amounts owed Plaintiffs for the televisions, that Plaintiffs were "days away from getting the payment" and that Defendants are confirming "that the payment of [Plaintiffs'] outstanding invoice is expected completed by…September [2013]". *See* ECF #5, Exhibit "C" to Complaint.

Ultimately, Defendants fail to raise any good cause for this honorable court to set aside the default. What Defendants attempt to do with this honorable court is what Defendants have done to Plaintiffs for the past four (4) years: stall, delay, string this matter along and impede any resolution of this matter. Because Plaintiffs will be prejudiced if this court were to set aside the default, because Defendants lack any meritorious defense to the default, and importantly, because the default was purely a result of Defendants' own culpable conduct, this honorable court should not set aside the default.

II. COUNTERSTATEMENT OF ISSUES PRESENTED

Should this Honorable Court deny Defendants' Motion to set aside the default because setting aside the default will prejudice the Plaintiffs, Defendants have not averred a meritorious defense, and the Default was purely a result of Defendants' own culpable conduct?

Suggested Answer: In the Affirmative.

III. DISCUSSION

This Honorable Court should deny Defendants' Motion to set aside the default because setting aside the default will prejudice the Plaintiffs, Defendants have not averred a meritorious defense, and the Default was purely a result of Defendants' own culpable conduct.

The courts will only set aside an entry of default if good cause exists which is determined by the broad discretion of the Court in order to accomplish justice. Schartner v. Copeland, 59 F.R.D. 653, 656 (M.D. Pa. 1973) aff'd, 487 F.2d 1395 (3d Cir. 1973). In deciding whether setting aside a default will accomplish justice, the court must determine whether: (1) the plaintiff will be prejudiced; (2) the defendant has a meritorious defense; and (3) the default was a result of defendants' culpable conduct. Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d Cir. 2000); Gold Kist, Inc. v. Kaurinburg Oil Co., Inc. 756 F.2d 14, 19 (3d Cir. 1985). Importantly, the lack of one factor is not, by itself, sufficient to warrant the setting aside of the default. Instead, defendant must also establish the existence of some or all of the other factors. Billy Steinberg Music v. Bonin, 129 F.R.D. 488, 489 (M.D. Pa. 1990); *see* Local Union No. 44, Sheet Metal Workers' Int'l Ass'n, Ne. Pennsylvania v. ACA Greenhouses, Inc., 2006 WL 759653, at *5 (M.D. Pa. Mar. 22, 2006) *citing* Kelly M. v.

Luzerne Intermediate Unit, 71 Fed. Appx. 116, 118-19 (3d Cir. 2003) (summarily affirming the denial of a motion to vacate a default judgment even though there was no prejudice to the plaintiff and an arguably meritorious defense was present where the defendant's failure to appear at hearings or respond to notices was culpable).

a. Plaintiffs will be prejudiced if default were set aside.

Plaintiffs will be prejudiced if the default were to be set aside. Defendants have continuously delayed any resolution of this action and have continuously forced Plaintiffs, and now this honorable court, to expend unnecessary resources. Meanwhile, Plaintiffs have assiduously and diligently pursued this case. The troubling facts of this case, the communications attached as exhibits to Plaintiffs' complaint, and the complete merry-go-round conduct of Defendants towards Plaintiffs and their counsel, demonstrates a pattern of dilatory conduct on the part of Defendants, calculated to impede the progress of this instant litigation.

While Plaintiffs have and continue to suffer great monetary loss and reputational damage from Defendants' actions, the setting aside of the default will not only increase Plaintiffs monetary damages, but, importantly, could impede Plaintiffs' ability to secure important discovery. Specifically, Defendants have continuously threatened Plaintiffs that they will file for bankruptcy if Plaintiffs pursue the money they are owed. Local Union No., 2006 WL 759653, at *5, *citing* Floyd v. Black Swan Shipping Co., 2002 WL 1676311, at *1 (E.D.Pa. July 18, 2002) (holding inability to secure information ..."is obviously prejudicial to a plaintiff in his attempt to prosecute his claim and obtain a resolution of his lawsuit."). Even more, as the particular facts of this instant matter demonstrate, the setting aside of the default may result in the increased potential for fraud or collusion on the part of Defendants. Finally, Plaintiffs, after nearly four years of attempting to get paid for the televisions they provided to Defendants and after nearly a month after securing the entry of default, Plaintiffs were preparing for a hearing on the damages to be assessed in this matter but are now forced to expend additional money and effort in opposing this instant motion.

b. Defendants have not averred a meritorious defense.

Defendants' purported defenses are not meritorious. In order to establish a "meritorious defense," the party seeking to have the default set aside must establish that the "allegations of defendant's answer, if established at trial, would constitute a complete defense to the action,... and such allegations must be specific and not merely conclusory statements." Billy Steinberg Music, 129 F.R.D. at 489. Here, Defendants assert incredibly for the **first time in nearly four years of having the televisions and remotes**, that the remotes were "defective." Defendants never raised this issue before their March 26, 2015 Motion. Indeed, Defendants own communications, attached to Plaintiff's Complaint, establish that Defendants admit to owing Plaintiffs the money for the televisions and that they were attempting to secure the funds to pay Plaintiffs. Even more, neither Defendants' attorney from Florida, Kerry Anne Schultz, nor the purported attorney Frank Fusco, ever mentioned that there were any "defects" or "issues" with the televisions. It is beyond incredible to imagine that Defendants would allow almost an entire four years to elapse with televisions that did not work, admit to Plaintiffs that they owe Plaintiffs money for the same televisions, promise to pay Plaintiffs for those same televisions, and then, on the eve of this court scheduling a hearing to assess the damages for the default, assert that despite the aforementioned, the remotes were "defective."

Next, Defendants ostensibly assert Plaintiffs lack a contractual relationship with any Defendant hotel despite the fact that, inter alia, the televisions at issue in this case were placed in each and every one of these individual Defendant hotels, these individual Defendant hotels accepted and benefitted from the televisions, and to date, the Defendants have failed and refused to pay Plaintiffs for the same, thereby unjustly enriching Defendants to the detriment of Plaintiffs.

Finally, Defendants argue that Counts VI, VII, VIII, and IX are barred by the Gist of the Action theory; however, this too is incorrect. The gist of the action doctrine does not bar a plaintiff from bringing claims for both breach of contract and tort. Plexicoat Am., LLC v. PPG Architectural Finishes, Inc., 2014 WL 1202544 (E.D. Pa. Mar. 21, 2014) *citing* Foster v. Northwestern Mutual Life, 2002 WL 31991114, at *3 (E.D. Pa 2002) (holding that a showing that the fraud was in the inducement of the contract would implicate the " 'larger social policies' of a tort action (e.g., society's desire to avoid fraudulent inducement in the employment context), and would justify extending this case beyond the contractual allegations");

Mendelsohn, Drucker & Associates v. Titan Atlas Mfg., Inc., 885 F.Supp.2d 767, 790 (E.D.Pa.2012) (denying dismissal because Plaintiff adequately pled that Defendant's action constituted "a breach of duties of honesty imposed by society, not contractual duties contained in the [contract]"); *see also* Pennsylvania Business Bank v. Franklin Career Servs. LLC, May Term 2002, No. 2507, 2005 WL 637456, at *1 note 2, 2005 Phila.Ct.Com.Pl. LEXIS 135, at *3 note 2 (C.C.P.Phila. March 14, 2005) (Jones, J.) ("The gist of the action doctrine does not preclude a party from bringing claims for fraud in the inducement of a contract alongside breach of contract claims, so long as the two claims arise out of two different wrongful acts.").

c. Default was purely a result of Defendants' own culpable conduct.

The default was purely a result of Defendants' own culpable conduct. A "reckless disregard for repeated communications from plaintiffs and the court," coupled with indicia of other objectionable behavior, may rise to the level of culpable conduct. Davis v. Metro. Life Ins. Co., 2015 WL 574616, at *8 (M.D. Pa. Feb. 11, 2015); Billy Steinberg Music, 129 F.R.D. at 491 ("defendant's intentional failure to respond in any manner to the complaint or even to hire an attorney to represent him in this action cannot be excused... [t]hus, the court concludes that defendant's failure to answer the instant complaint was the result of his own culpable conduct and hence, not excusable."); Schartner, 59 F.R.D. at 656 ("Certainly the failure to take any action whatsoever until approximately 10 months after service of the complaint, and only upon receipt of notice of the Clerk's entry of default, is evidence of neglect… it would probably be considered inexcusable neglect.").

Analogous to the foregoing cases, Defendants in this instant case have continuously shown a total and reckless disregard for the Plaintiffs' repeated communications and court filings. In fact, they have shown even greater outrageous culpable conduct by putting counsel for Plaintiffs in touch with a purported attorney representing he was interested in discussing the damages in this case so that the Parties could come to a resolution and then failing to subsequently communicate in any way with Plaintiffs. Moreover, similar to the court's rationale in *Billy Steinberg Music*, where the court found defendant's failure to respond to plaintiff's complaint or even to hire an attorney to represent defendant to be of defendant's own culpable conduct, and thus, not excusable, so too should this honorable court find Defendants even more egregious conduct in this case to be of their own culpable conduct; thereby denying Defendants' Motion.

d. Alternative Sanctions

Alternatively, if this honorable court sets aside the default, Plaintiffs respectfully request appropriate sanctions. When determining an appropriate sanction, courts may consider, *inter alia,* the seriousness of the sanctionable conduct, the damage caused by the conduct, the effect of the conduct on the administration of justice, and the sanctioned party's ability to pay. Agnew v. E*Trade Sec. LLC, 811 F.Supp.2d 1177, 1185 (E.D.Pa.2011). The purpose of an alternative sanction in this context is to compensate plaintiff and to deter such conduct in the future. Airtech v. Born Envtl. Servs., Inc., 2003 WL 22097489, at *2 (E.D.Pa. May 27, 2003); Davis, 2015 WL 574616, at *9-10; *see* Airtech, 2003 WL 22097489, at *2 ("In an appropriate case, a Court may, as an alternative sanction, order a defendant to reimburse the plaintiff for the expenses that it has incurred in prosecuting a motion for default judgment.").

IV. CONCLUSION

It is respectfully submitted that due to the prejudice that will be caused to Plaintiffs, Defendants' non-meritorious defenses, Defendants' own culpable conduct, and the particular egregious facts of this case, that this honorable court deny Defendants' Motion to set aside the entry of default and schedule this matter for a hearing solely to determine the amount of damages Plaintiffs have suffered. Alternatively, Plaintiffs request appropriate sanctions.

The Siejk Law Firm, P.C.

By: */s/ Ryan M. Molitoris*

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Exhibit "A"

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From: Kerry Anne Schultz [mailto:kaschultz@fountainlaw.com]
Sent: Thursday, November 13, 2014 2:44 PM
To: 'Frank Fusco'; 'rmm@siejklaw.com'; 'rmm@siejklaw.com'
Subject: LHS GULF SHORES, ETC AL (PTD ENTERPRISE, --LITIGATION) --URGENT

Dear Mr. Siejk:
It was a pleasure to speak with you. As we discussed, Mr. Frank Fusco will be reaching out to you to discuss this case. I am connecting the two of you via email.
Thank you for your consideration. Best regards, Kerry Anne

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CERTIFICATE OF SERVICE

I, Ryan M. Molitoris, Esq., do hereby certify that a true and correct copy of the foregoing Brief in Opposition was served via the Court's CM/ECF electronic Filing System upon all counsel of record for Defendants.

Dated: April 8, 2015

/s/ Ryan M. Molitoris
Ryan M. Molitoris, Esq.